Supreme Court, U.S.
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No. 10-

In the Supreme Court of the United States

NELSON CINTRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the denial of a motion to recuse in circumstances in which the presiding Judge's minor child was recently the victim of a traumatic crime closely similar to that alleged against the petitioner violate the governing standard for recusal under the judicial bias and prejudice statutes, 28 U.S.C. § 144 and 28 U.S.C. § 455(a), and contravene fundamental due process guarantees as enunciated in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009), requiring recusal in a situation that presents "a serious, objective risk of actual bias," *id.* at 2265?

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nelson Cintron respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 09-15385 in that court on October 29, 2010, *Nelson Cintron v. United States*, which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (1a).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 29, 2010. On January 20, 2011, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 31, 2011. App. No. 10A716. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction under 28 U.S.C. § 2255. The court of appeals had jurisdiction under 28 U.S.C. § 2253, applicable to appeals of final decisions in § 2255 cases, and pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction to review all final decisions of United States district courts.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const., amend. V

> No person shall ... be deprived of life, liberty, or property, without due process of law ... .

28 U.S.C. § 144

Bias or prejudice of judge

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> ....

28 U.S.C. § 455(a)

Disqualification of justice, judge, or magistrate judge

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

1. Course of Proceedings

On March 6, 2007, the petitioner was charged in a three-count indictment with: Count One, attempted enticement of a minor in violation of 18 U.S.C. § 2422(b); Count Two, distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1); and Count Three, possession of child pornography in violation of § 2252A(a)(5)(B) and (b)(2). On July 9, 2007, the petitioner pled guilty to Count Two, distribution of child pornography. Sentencing was scheduled for September 20, 2007, but upon the government's assertion that it had uncovered information from the petitioner's computer it had failed to uncover before, a continuance was granted in order that defense counsel could have time to investigate the new evidence. The petitioner was sentenced on October 17, 2007 to 15 years in prison followed by 5 years of supervised release and a lifetime status as a sex offender. On October 25, 2007, the petitioner filed a notice of appeal, but in light of an appeal waiver provision in the plea agreement, the petitioner took a voluntary dismissal of the appeal, and the appeal was dismissed on June 30, 2008.

On May 19, 2009, the petitioner filed a Motion to Recuse, a Motion to Vacate and a Motion to Compel. On May 20, 2009, the district court ordered the government to respond to both the motion to recuse and the § 2255 motion.

The basis for the Motion to Recuse[1] was that, during the course of investigating and preparing the § 2255 Motion to Vacate, information was discovered that presiding United States District Judge William Dimitrouleas' family member, a 13-year-old son, had suffered a sexual incident on October 8, 2000. The defendant, Edward Milner, was charged in Florida state court, in a two-count information, for (1) lewd or lascivious exhibition and (2) lewd or lascivious conduct. Contact was made with the trial lawyer who represented Milner, Jeffery Voluck; and counsel for the petitioner was able to obtain Mr. Voluck's file, which contained police reports, a charging document, trial transcripts, deposition transcripts and the presentence investigation report, among other things. Edward Milner proceeded to trial on September 6-7, 2001. The jury found Milner guilty as charged, and he was sentenced to concurrent terms of 5 years' incarceration followed by 5 years' sex offender probation. Milner would apparently have been released to the community sometime in the period just prior to the sentencing of the petitioner. Standard procedure indicates that the Dimitrouleas family was notified of his release, and Judge Dimitrouleas admitted to such notice in his order denying the Motion to Recuse.

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[1] The Motion to Recuse and Issue I in the § 2255, MR. CINTRON WAS DENIED HIS DUE PROCESS RIGHTS DUE TO PRESUMED JUDICIAL BIAS AND PREJUDICE," were originally filed under seal to protect the district court's privacy and involved the same set of facts and basic legal argument. However, the district court subsequently unsealed both the motion and Issue I.

The facts on which the jury convicted Milner are as follows: S.D., a 13-year-old boy, testified that he and his father (United States District Judge William Dimitrouleas) went to the gym to work out. Milner approached S.D. in the shower at the gym while holding his penis and was masturbating. The shower area was private and Milner walked directly into S.D.'s shower stall. Milner was naked and standing approximately two feet from S.D. Milner asked S.D. if he was masturbating and thereafter made a gesture to S.D. to masturbate with him as he was moving closer to him. Milner also verbally asked if he could masturbate S.D. S.D. immediately left the shower, quickly went to his father, and explained what happened. S.D. testified that he was feeling very nervous and upset at the time.

Judge Dimitrouleas testified during trial that he and his son joined the gym for his son's 13th birthday and worked out together approximately 3 times a week. He further testified that as a result of the incident, when his son came out of the shower he was "extremely upset . . . almost hyperventilating . . . couldn't catch his breath . . . I'd never seen him that upset before in my life." Trial transcript at 152, 164, Exhibit "B." S.D. then related to his father the incident as described above. Judge Dimitrouleas then asked Jack Devaney, someone he knew as law enforcement and who also happened to be at the gym, to call the police and told him what happened. Shortly thereafter, Judge Dimitrouleas saw Milner and described him as having a "look on his face like I'm going to get out of here." Trial transcript at 153, Exhibit "B." While waiting for the police to arrive, the

father went back to be with his son and described him as still "very, very upset . . . he wanted to hold my hand. . . . S.D. hasn't wanted to hold my hand for a long time. He was crying. Shaking. He couldn't settle down. I called up his mother and said, 'you better get over here, Natalie. There's a reason we're late for dinner. You better get over here.' She got over there. He literally fell into her arms. S.D.'s not normally that type of an emotional kid to show emotions particularly in public. But he was very upset." Trial transcript at 156, Exhibit "B."

Finally, Judge Dimitrouleas participated in the sentencing process, recommending in the PSI that "if the defendant was aware of his being HIV positive at the time of this offense, and was attempting to spray bodily fluids, this would be an aggravating factor. It is my recommendation that the defendant be sentenced to fifteen (15) years Florida State Prison on each count, concurrent."

On May 27, 2009, the government responded to the petititioner's Motion to Recuse premised on the above circumstances. On June 10, 2009, the district court denied the Motion to Recuse in a 12-page order. On June 11, 2009, the government responded to the Motion to Vacate. Thereafter, the district court granted the petitioner leave to file a reply, which was filed on July 31, 2009. On August 6, 2009 the court denied the § 2255 Motion to Vacate without an evidentiary hearing and denied the Motion to Compel Discovery. A notice of appeal and a request for certificate of appealability were timely filed. The district court granted the certificate as to whether the

court should have recused itself from hearing the petitioner's § 2255 Motion to Vacate.

2. Factual Background

The underlying events of this case occurred approximately three years after the petitioner graduated with an M.B.A. degree from Nova Southeastern University. At the time of his arrest, the petitioner was a 28-year-old, working in the mortgage industry with no prior arrests. On January 22, 2007, the petitioner was arrested the first time at his home by the State of Florida. The State failed to timely file charges against the petitioner. Thereafter, the petitioner was charged by the Federal Government. On March 6, 2007, at arraignment, the petitioner learned he was charged with three counts, Count One, attempted enticement of a minor; Count Two, distribution of child pornography; and Count Three, possession of child pornography and pled not guilty.

The basis of the allegations is as follows: The petitioner was chatting via the internet with alleged underage girls, 14 years old, but the girls were actually undercover law enforcement. The chatting occurred between the petitioner, located in Florida, and two different undercover agents outside the State. During one of the chats, the petitioner sent a picture of himself along with two pictures of supposed prepubescent girls. The chatting also involved conversation which was sexually explicit, such as references to masturbation. Ultimately, the petitioner was lured by undercover agents to chat with a Florida undercover agent posing as a 14-year-old girl. When pushed by the agent in

Florida to meet with the alleged 14-year-old girl, the petitioner e-mailed her that it was illegal to meet and that he hoped she understood.

The petitioner hired attorney Tom Sclafani. After the petitioner's release on bond and before his sentencing, he met with Mr. Sclafani approximately three times. Counsel soon convinced the petitioner to change his plea from not guilty to guilty by advising him that he would receive little prison time if he accepted the plea agreement. Mr. Sclafani additionally explained there was a possibility of probation especially if the petitioner presented letters from family and friends to the Judge. Adding to the impetus for a plea, Mr. Sclafani explained that he was placed in an untenable situation by the denial of his motions for continuance, despite numerous requests. Counsel informed the Court that he was not ready, could not properly advise his client, and was being placed in a position where he would be subject to an ineffective assistance of counsel claim as follows:

> Mr. Sclafani: Judge, most respectfully, I am totally unprepared for trial. I mean this would be akin to when the Supreme Court in Strickland referred to a lawyer being somebody other than the guy in a suit sitting next to the client . . . Most respectfully, this is going to be a malpractice suit against me and a 2255.

Transcripts dated July 6, 2007, at pg. 4.

At sentencing, counsel withdrew his objections to the PSI report and failed to properly represent the

defendant as to guideline and mitigating factors, such that the court sentenced the petitioner to 15 years imprisonment, 5 years of supervised release and a lifetime of sex offender probation.

REASONS FOR GRANTING THE WRIT

Petitioner Nelson Cintron respectfully submits that the interests of justice merit the granting of certiorari relief in this case, which presents a deviation from the standard of judicial recusal, pursuant to statutory requirements, as enunciated by this Court in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009), resulting in a deprivation of the petitioner's fundamental due process rights stemming from a "serious, objective risk of actual bias," *id.* at 2265, and jeopardizing the fairness and integrity of judicial proceedings and the separation of judicial and prosecutorial functions.

28 U.S.C. §455(a) states, in pertinent part, that "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." The purpose of the statute, which was adopted in conformity with the analogous canon in the Code of Judicial Conduct, *United States v. Young*, 39 F.3d 1561, 1569 (11th Cir. 1994), is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). The statute does not require a motion; it requires a judge to disqualify himself if the facts cast doubt on his impartiality. *United States v. Phillips*,

664 F.2d 971, 1002 (11th Cir. 1981)(quoting *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981)).

The statute does not set forth specific circumstances requiring recusal; instead, it provides a general rule requiring recusal when there is an appearance of impropriety. The statutory standard, supported by its provisions and underlying legislative history, is clear: "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988) (citing *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980)). Thus, Section 455(a) "sets up an objective standard, rather than the subjective standard set forth in the prior statute through use of the phrase 'in his opinion.' According to the report of the House Judiciary Committee, the general standard of section 455(a) was designed to promote the public's confidence in the impartiality and integrity of the judicial process by saying, in effect, that if any reasonable factual basis for doubting the judge's impartiality exists, the judge 'shall' disqualify himself and let another judge preside. 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6354-55." *Potashnick*, 609 F.2d at 1111. Moreover, any doubts must be resolved in favor of recusal. *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989).

28 U.S.C. § 144 provides, in pertinent part, that "whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that

the judge . . . has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein . . . ." The purpose of section 144 is the same as the purpose section 455(a): to guard against personal, extrajudicial bias or the appearance of partiality arising out of such bias. *United States v. Phillips*, 664 F.2d at 1002.

Similarly, the test is the same under both statutes: disqualification is to be determined on the basis of conduct which shows bias or prejudice or lack of impartiality – conduct extrajudicial in nature as distinguished from conduct within a judicial context. *Id.* at 1002-03. Likewise, an allegation of bias and prejudice sufficient to require disqualification is the same under both statutes: the bias and prejudice must stem from an extrajudicial source. *Id.* at 1002 (citing *United States v. Grenfell Corp.*, 384 U.S. 563 (1966)).

While section 455(a) requires the movant to demonstrate that a reasonable person "would harbor doubts about the judge's impartiality," section 144 is satisfied where the movant merely "allege[s] facts sufficient to convince a reasonable person that bias exists." *Id.* at 1002 n. 36 (internal citations omitted). In addition, while section 455(a) does not stipulate a formal procedure by which claims arising under it must be raised, section 144 requires the movant's filing of an affidavit, and the judge's determination of its legal sufficiency, taking the allegations of the affidavit as true for the purposes of recusal. An affidavit is legally sufficient if it meets a three-part test: 1) the facts must be material and stated with particularity; 2) the facts must be such that, if true, they would

convince a reasonable person that bias exists; and 3) the facts must show the bias is personal as opposed to judicial in nature. *See id.* at 1002; *Parrish v. Board of Comm'rs*, 524 F.2d 98 (5th Cir.)(en banc), *cert. denied*, 425 U.S. 944 (1976).

Pursuant to these statutory directives, the district court was obligated to disclose to the petitioner, his family and his counsel the incident involving his close relative, but did not do so. Further, the government, which had knowledge of the underlying facts, never disclosed them to the defense. At a minimum, the court erred in not transferring the recusal matter to an objectively unbiased Judge. If nothing else, the non-disputable facts outlined in the motion called for the matter to be heard by a different Judge and determined by a different Judge. This is particularly true in light of *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009). *Caperton* was decided June 8, 2009, two days before the district court issued its order denying the Motion to Recuse and was cited in the district court's order. According to *Caperton*, the district court in this case engaged in the exact procedure which the Court found improper. In *Caperton*, the Court explained that because of the difficulty of seeking to precisely determine, through judicial introspection, the pull of personal factors that might influence a decision, the focus should not be on the individual capacity or emotional strength of a particular judge to overcome such factors, but rather on an objective analysis that does not focus on the individual judge's actual bias or lack of bias:

The difficulties of inquiring into actual bias, and

> the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise, there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Id. at 2263. In this analysis, the court must undertake a "'realistic appraisal of psychological tendencies and human weakness,'" to determine whether a "'risk'" of bias requires, under the Due Process Clause, recusal of the judge. *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). *See also Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 910 (2010) (recognizing that the remedy of recusal affirmed in *Caperton* was "based on a litigant's due process right to a fair trial before an unbiased judge.") (citing *Withrow v. Larkin*, 421 U.S. at 46).

As in *Caperton*, in which the Court acknowledged that "[n]ot every" campaign contribution poses a ground for recusal, *id.*, likewise not every personal subjection of a judge or the judge's family to crime is of so great a nature that bias is to be presumed. But certain types of offenses – including, specifically, a

deviant sexual attack on a minor child and significant involvement and expression of response in regard to the handling of such offense and later related events – can be of such a traumatic nature that it is only reasonable to expect, in an objective sense, an effect on an ordinary person, even though the particular judge's strength of character and unquestioned integrity were such that the judge could subjectively overcome any such bias or influence, whether conscious or unconscious.

In discussing the trend to resolution of recusal issues without need to resort to the constitutional mandate under the Due Process Clause, the Court in *Caperton* quoted with approval the objective-appearance standard for recusal. *Id.* at 2266 ("The ABA Model Code's test for appearance of impropriety is 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.'") (quoting ABA Annotated Model Code of Judicial Conduct, Canon 2A, Commentary (2004)). Likewise, the Court recognized the less demanding standard under 28 U.S.C. § 455(a), requiring: "'Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'" *Id.* (quoting § 455(a)). This governing federal standard falls plainly within those "codes of judicial conduct [that] provide more protection than due process requires." Id. at 2267.

In the instant case, the district court, in ruling on

the Motion to Recuse, applied a subjective standard, even though the law clearly favors an objective standard of review. Jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Ultimately, the particular nuances of a case, and the fact that events arising out of the prior matter were still ongoing near the time of handling of the case in which recusal was or could have been sought are factors that affect the scope of a recusal inquiry. And from statistics filed by the district court indicating a higher rate of downward departure in the immediate aftermath of the underlying criminal offense – during which period the district court regularly made disclosure of the offense – the record suggests that time and process may have had varied impacts in relation to this issue. The statistics provided by the district court indicate that the sentence imposed on the petitioner was the highest ever imposed by the court for this type of offense. Similarly, the district court's listing of numerous factors that would have supported an argument for a substantial downward variance – as seen in questions asked by the court, rather than as part of any variance argument, in that admittedly no such argument was made by the petitioner's counsel at or prior to sentencing – creates a striking contrast when viewed in light of the length of the sentence ultimately imposed, 15 years imprisonment, just 5 years below the statutory maximum.

The need for proceedings before an impartial judge is compelling here. The personal characteristics of the petitioner are such that, by comparison with the prior case affecting the court's family, they clearly could be

perceived as affecting the court's decision. Any "objective, disinterested, lay observer," 28 U.S.C. § 455(a), would question a Judge's ability to be impartial in a case such as the petitioner's which allegedly involved child pornography and internet chats involving girls the same age as the Judge's son and where the petitioner had been charged with enticement of a minor. A sentence of 15 years was the district court's recommendation for Milner and, coincidentally, the sentence the court imposed on the petitioner. The defendants also appear to look remarkably similar: Milner is described as 5 feet, 7 inches tall, 145-170 lbs, with blue eyes and blond hair. The petitioner is 5 feet, 6-7 inches tall, 145 lbs, with blue eyes and blond hair. Any reasonable lawyer would move for cause to recuse such a person from sitting on a jury, and any Judge, viewing these facts reasonably and objectively, would grant such a request, recusing himself from hearing any matters related to the then-pending § 2255 Motion to Vacate.

While lower-court precedent with respect to judicial recusal when judges or their families are victims of a crime similar to an action before them is scarce, *see Mann v. Thalacker*, No. 95-3008, 1996 WL 33423405, at *9 (N.D. Iowa Oct. 9, 1996) ("This court was unable to find any case law dealing with a judge's duty to recuse when he has been a victim of a crime similar to that for which the defendant is being tried."); *United States v. Fiat Motors of N. Am., Inc.*, 512 F. Supp. 247, 250-51 (D. D.C. 1981) (identifying reluctance to recuse the judge presiding over an automobile recall case who himself was a past victim of an auto accident because "no case authority directly on point or similar to the

situation here, involving disqualification or recusal, has been found"), the principle established in *Caperton*, and its underlying rationale, militates strongly in favor of recusal in such a highly personal circumstance, where the likelihood of actual bias – in the instant case, premised on traumatic harm to the Judge's minor child – is palpable. *See Sun v. Pierce*, 630 F.3d 685, 691 (7th Cir. 2011) (recognizing that "Recusal also may be required outside of these specific instances if the probability of actual bias is high enough.")(citing *Caperton's* focus on a situation presenting "a serious risk of actual bias," 129 S.Ct. at 2263-64).

The implied bias doctrine, requiring disqualification of jurors for cause not merely when there is a factual showing of actual bias, but also where circumstances create an implication of bias as a matter of law, is a relevant analogue for the analysis here, where it is clear that a cause challenge have been granted given a fairly recent traumatic offense and the personal similarities of the defendants in the two matters. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976) (Where there is "such a close connection to the circumstances at hand that bias must be presumed," a challenge for cause must be granted even in the absence of a showing of actual prejudice.) (citing, *inter alia*, *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968)). In *Haynes*, the Second Circuit adopted the average man test under which implied bias exists where "'in general persons in a similar situation would feel prejudice.'" *Haynes*, 398 F.2d at 984 (quoting *United States v. Burr*, 25 Fed. Cas. 49, 50 (No. 14692g) (C.C. Va. 1807) (opinion by Marshall, C.J.)).

In *United States v. Luong*, 2008 WL 1970027 (E.D. Cal. May 2, 2008), the court stated that the defendants' arguments in that case "rely upon the doctrine of 'implied bias,'" which is more commonly cited as a ground for juror disqualification, and allows for "bias to be implied or presumed from the 'potential for substantial emotional involvement, adversely affecting impartiality,' inherent in certain relationships." *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) (quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977)). Courts appear willing to apply that same doctrine when determining the propriety of a motion to recuse a judge. *See Liteky*, 510 U.S. at 552 (equating the process of weighing judicial impartiality for recusal purposes with the inquiry into a prospective juror's impartiality for disqualification purposes); *Mann*, 1996 WL 33423405, at * 9 ("[A]nalogous cases involving challenges for cause for potential jurors are therefore instructive in discerning whether a judge should recuse himself in this situation."). A key factor in this analysis seems to be "the similarity of the incidents," as in the instant case. *See Allsup*, 566 F.2d at 71 ("That [people] will be prone to favor that side of a cause with which they identify themselves either *economically, socially, or emotionally is a fundamental fact of human character.*") (quoting *Kiernan v. Van Schaik*, 347 F.2d 775, 781 (3d Cir. 1965)).

Furthermore, for procedural reasons alone, the court's continued handling of the matter after the facts of his family's situation have come to light would be impermissible. *See, e.g., Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979) (search warrant invalid where issuing state judge "did not manifest that neutrality

and detachment demanded by a judicial officer when presented with a warrant application for a search and seizure"). "Not only is a biased decision maker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Brown v. Vance*, 637 F.2d 272, 283 (5th Cir. 1981)(quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955)).

The circumstances here – including the physical similarity of defendants, the length of the sentence imposed on a young, first-time offender (apparently the longest such sentence ever imposed by the court), the especially traumatic nature of the prior offense, and other factors previously discussed – created a situation in which disclosure, effective representation, and ultimately recusal were necessary to avoid the appearance of the effect of implied bias. An impartial judge should have presided over the underlying criminal proceedings in the petitioner's case.

In light of both statutory grounds of recusal and the fundamental constitutional demands of due process, as well as the need to ensure the fairness and integrity of judicial proceedings and the separation of judicial and prosecutorial functions, the interests of justice would be served by this Court's granting of a writ of certiorari to clarify the applicable objective standard for the evaluation and granting of a motion to recuse in circumstances in which a sitting Judge's minor child has been the victim of a traumatic crime and perpetrator closely parallel to the defendant and the charges against him, giving rise to a "serious risk of actual bias ... based on objective and reasonable

perceptions." *Caperton*, 129 S.Ct. at 2263.

CONCLUSION

Based upon the foregoing petition, Petitioner Nelson Cintron respectfully requests that this Court grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Fort Lauderdale, Florida
March 2011

IN UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

09–15385
Non-Argument Calendar

D. C. Docket Nos. 09-60740-CV-WPD,
07-60049-CR-WPD

NELSON CINTRON,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 29, 2010)

Before TJOFLAT, EDMONDSON and MARTIN, Circuit Judges.

PER CURIAM:

THIS IS an appeal of the denial of a motion to vacate filed pursuant to 28 U.S.C. § 2255 by Nelson Cintron. We construe the certificate of appealability that issued as follows:

> Whether Cintron was denied due process of law when the district judge denied his

> motion to recuse based on bias, prejudice, and/or lack of impartiality, and/or whether Cintron was denied his due process rights due to presumed Judicial bias and prejudice during his guilty plea and sentence.

Before he denied Cintron's § 2255 motion, the district judge denied Cintron's motion that the judge recuse on the ground that a close relative of the judge had been the victim of a crime similar to the underlying offense that Cintron committed. Cintron argues that the judge could not be impartial in his case because of the similarity between his case and an incident involving the judge's close relative. He contends that he was denied his statutory rights under under 28 U.S.C. §§ 455(a) and 144.

We review for abuse of discretion a judge's denial of a motion to recuse. *United States v. Amedeo*, 487 F.3d 823, 828 (11th Cir. 2007). A district judge abuses his discretion when he "applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in Judgment." *Tran v. Toyota Motor Corp.*, 420 F.3d 1310,1315 (11th Cir. 2005)
(quotation omitted).

Under 28 U.S.C. § 455(a), a judge shall "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Recusalls appropriate under § 455(a) only if "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was

sought would entertain a significant doubt about the judge's impartiality." *Amedeo*, 487 F.3d at 828 (quotation omitted). As a general rule, "a judge's rulings in the same case are not valid grounds for recusal." *Loranger v. Stierhelm*, 10 F.3d 776, 780 (11th Cir. 1994).

Pursuant to 28 U.S.C. § 144, recusal of a district judge is required when a party "makes and files a timely and sufficient affidavit that the judge has a personal bias or prejudice either against him or in favor of an adverse party." 28 U.S.C. § 144. In other words, to warrant recusal under § 144, "the moving party must allege facts that would convince a reasonable person that bias actually exists." *Chrzsto v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000). Moreover, "unsupported, conclusory, or tenuous allegations" are not sufficient to warrant disqualification. *Giles v. Garwood*, 853 F.2d 876,878 (11th Cir. 1988).

Because Cintron failed to meet the statutory requirements to warrant recusal under 28 U.S.C. §§ 455(a) and 144, the district judge did not abuse his discretion in not disqualifying himself from passing on Cintron's § 2255 motion.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-60740-CIV-DIMITROULEAS
(07-60049-CR-DIMITROULEAS)

NELSON CINTRON,
Movant,
v.
UNITED STATES OF AMERICA,
Respondent.

FINAL JUDGEMENT AND ORDER DENYING MOTION TO VACATE, DENYING MOTION TO COMPEL DISCOVERY

THIS CAUSE is before the Court on Movant's, Cintron, May 19, 2009 Motion to Vacate [DE-I] and his May 19, 2009 Motion to Compel Discovery. [DE-2]. The Court has considered the Government's May 27, 2009 Response to Motion to Compel [DE-14], Cintron's June 6, 2009 Reply to Motion to Compel [DE-16], the Government's June 11, 2009 Response to Motion to Vacate [DE-20] and Cintron's July 31, 2009 Reply to Motion to Vacate [DE-37]. The Court has considered transcripts, the Pre-Sentence Investigation Report (PSIR), and the Court file, and having presided over this cause, finds as follows:

BACKGROUND

I. On March 6, 2007, Cintron was Indicted and charged with Count One, Attempted Enticement of a Minor in violation of 18 U.S.C. § 2422(b); Count Two,

Distribution of Child Pornography in violation of 18 U.S.C. § 2252A(a)(2)(A); and Count Three, Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). [CR-DE-I]. Cintron had been arrested on similar state charges after a search warrant was served on his home on January 22, 2007. When the state did not pursue the case. this federal prosecution ensued.

2. On March 30. 2007, a trial date of April 30, 2007 was set. [CR-DE-22]. On March 27, 2007, Judge Seltzer entered a Discovery Order which required motions to be filed within 28 days. [CR-DE-21]. At a status conference held before Judge Snow on April 11, 2007, it was represented that a plea was likely, but that Cintron could be ready for trial by mid-summer. [CR-DE-25]. At the Calendar Call held on April 27, 2007, Cintron did not appear. Nevertheless, the Court granted a defense[1] continuance with the provision that Cintron file a written speedy trial waiver.[2] The trial was reset to July 9, 2007. [CR-DE-30]. On May 2, 2007, defense counsel met with the prosecutor and was told that mirror images of the hard drives would not be provided, presumably because they contained child pornography and the prosecutor was constrained by the statute, 18 U.S.C. §3509(m), from disseminating them. [CR-DE-33]. Cintron waited over a month to move for production of a mirror image.

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[1] Counsel asked for a continuance at least until July. [CR-DE-90, p. 2].

[2] Cintron filed the waiver that afternoon. [CR-DE-31 J.

3. On May 16, 2007, this Court granted the Defense Motion for Extension of Time to File Pre-Trial Motions [CR-DE-34]. The deadline was reset to June 6, 2007. On June 6, 2007, no motions had been filed, and defense counsel requested another extension of time to file pretrial motions (like a motion to suppress) because he had not examined the contents of the hard drives and would be filing a motion to obtain a mirror image of the hard drives. [CR-DE-38]. On June 11, 2007, this Court denied the motion for extension of time to file motions, without prejudice to being renewed, should the Court continue the July 9th trial date; in a footnote the Court recognized that the trial date had been announced at the previous calendar call, without objection by either party. [CR-DE-42].

4. On June 6, 2007, Cintron filed an extensive, fifteen (15) page Motion for Mirror Image of Hard Drives. [CR-DE-39]. Attached to the motion was an affidavit and curriculum vitae of an expert, D. Douglas Rehman. [CR-DE-39-2]. In that motion, it was indicated that it would take the experts two hundred (200) hours to conduct their examination. After the Government filed a response [CR-DE-47], Cintron filed a Reply on June 19, 2007. [CR-DE-49]. On June 20, 2007, this Court found that an ample opportunity to review the hard drives had been given and denied the Motion for Mirror Images of the Hard Drives. [CR-DE-50]. The Court believed that there had been no violation of the discovery rules. U.S. v. Kimbrough, 69 F.3d 723,731 (5th Cir. 1995) cert, denied, 517 U.S. 1157 (1996).

5. On June 8, 2007, Cintron filed a Brady

motion. [CR-DE-40]. On June 15, 2007, the Government filed a Response. [CR-DE-48]. The motion was denied on June 20, 2007. [CR-DE 50- 1].

6. On June 11, 2007, Cintron filed a Motion to Produce Discovery. [CR-DE-44]. It was granted on June 20, 2007. [CR-DE-50-2].

7. On June 22, 2007, Cintron filed an Unopposed Motion for Continuance of Trial, In which he asked for a trial date of no earlier than September 10th, realizing that one or more additional continuances may be needed. [CR-DE-51]. On the same date, this Court denied the motion. [CR-DE-52].

8. On June 26, 2007, Cintron filed a Demand for Discovery of expert summaries. [CR DE- 53].

9. On July 6, 2007, this Court denied Cintron's renewed motion for a continuance. [CR DE- 54]. At the Calendar Call, defense counsel complained that he was not ready for trial because his expert had not been able to review the hard drives of the computer; he predicted that if the case proceeded to trial that a malpractice suit and a 2255 motion would be forthcoming. [CR-DE-91, p. 4]. The Court also was made aware of the fact that the Government was not ready for trial. [CR-DE-91, p. 3]. Nevertheless, the Court indicated that if the Government were not ready, it could move to dismiss the charges. [CR-DE-91, p. 3]. However, the Court did offer to start the trial a day later. [CR-DE-91, p. 7]. On July 6, 2007 Cintron filed three (3) tardy motions: two motions to suppress and a motion in limine:

A. Cintron filed one Motion to Suppress [CR-DE-55] in which he contended that the probable cause for the warrant was stale; the search of his vehicle on the street was not authorized; no return of inventory was filed; the scope of the search was too broad; and a Franks violation occurred when, subsequent to the signing of the warrant on January 19, 2007, but before its execution on January 22, 2007, police did not tell Judge Snow that Cintron had balked at meeting the young girl in person.

B. Cintron filed a second Motion to Suppress [CR-DE-56] m which he moved to suppress derivative evidence from AOL or Comcast obtained through a subpoena. However, Cintron relied on a Sixth Circuit case that was later vacated. Waishak v. U.S., 532 F.3d 521 (6th Cir. 2008). The seizure was authorized by 18 U.S.C. §2703(c)(2). U.S. v. Bobb, 2009 WL 2391918 (11th Cir. August 6, 2009).

C. Cintron filed a Motion in Limine [CR-DE- 56] to prevent the introduction of evidence due to a discovery violation. The Government filed a Response on July 7, 2007. [CR-DE 57]. The Court never had an opportunity to rule on any of these motions as Cintron pled guilty on July 9, 2007.

Moreover, during his change of plea hearing, Cintron specifically waived any complaints about either of the suppression motions or the motion in limine. [CR-DE-85, p. 19].

10. On July 9, 2007, Cintron pled guilty to Count Two, Distribution of Child Pornography [CR-DE-59], pursuant to a plea agreement. [CR-DE-61]. Cintron had an opportunity to read and discuss his Plea Agreement with his lawyer before he signed it. [CR-DE 85, p. 8]. The Plea Agreement represented in its entirety any understanding that he had with the Government. Cintron said that he understood the terms of the Plea Agreement. [CR-DE-85, p. 8]. Cintron was aware of the statutory maximum of twenty (20) years and the minimum sentence of five (5) years. [CR-DE-61, p. 2]; [CR-DE-85, p. 4, 7, 9, 16]. Pursuant to the agreement, no further charges were to be filed by law enforcement officers in Ohio and California. [CR-DE-61, p. 4]; [CR-DE-85, p. 12]. Cintron waived his right to take an appeal. [CR-DE-61, p. 6]; [CR-DE- 85, pp. 18-20, 26, 31-32]. The Court granted an ore tenus motion to amend Cintron's name in the indictment. [CR-DE-62]; [CR-DE-85, p. 21]. Importantly, by pleading guilty, Cintron specifically understood that he was giving up any complaints about the Court's denial of his request for continuance, [CR-DE-85, pp. 26-27], or that his lawyer or expert should have been allowed more time. [CR-DE-85, p. 32]. Cintron gave up any and all defenses to the charge. [CR-DE-85, pp. 36-37].

11. The following factual basis was presented at the plea colloquy:

> THE COURT: And would the Government summarize the facts as to Mr. Cintron's case?
>
> MR. BROWN: Yes, Your Honor.

If this case were to go to trial, the Government would be prepared to prove that beginning in July of last year, July 29 of 2006, Chief Dan Haueter, H-a-u-e-t-e-r, of the New Waterford Police Department in New Waterford, Ohio was conducting an undercover online investigation. And on that date this defendant made contact with Chief, who was portraying himself as a 14-year old girl from Ohio. There were several communications between the defendant and Chief Haueter. Those communications were sexually graphic in nature and those communications continued through January of 2007.

During the time that he was -- that the defendant was communicating with Chief Haueter, he also was communicating with an individual who he believed to be a 13-year old girl in California bearing the e-mail address of Calbritany93 (phonetic). It is now understood that Calbritany93 was also an undercover officer out in California.

As a result of the conversations with Calbritany93 and Chief Haueter, who he e-mail address was Tinagreeneyesl4 (phonetic), the defendant had the occasion on October 27th, to Calbritany93 and on November 5th to Tinagreeneyes14, to transmit and send via the internet, three images, each of those containing child pornography as that term is defined in Title 18, United States Code, 2256.

As a result of these conversations and communications with Tinagreeneyes14, Chief Haueter was able to ascertain the identity and location of the defendant. Once he determined that the defendant was located in the South Florida area, he turned the defendant over to another undercover officer here in Broward County who was using the screen name Tiffanycutie2 (phonetic), also posing as a 13-year-old girl.

The defendant began to communicate with that e-mail address, the person he thought was a 13-year-old girl, In extremely graphic nature beginning on December 31 of 2006, and continuing through January 20th of this year.

As a result of those conversations there was discussion about a meet between the Defendant and who he believed to be a 13-year-old girl. That meet was to take place on January the 20th of 2007. And on the date and time of the proposed meet the Defendant, however, did not appear for the meet.

All of the above listed activities took place. Your Honor, while the defendant was here in Broward County, in the Southern District of Florida, utilizing his AOL account or either instant messages account, which accounts caused all communications to be routed through Virginia and then on to either Ohio or California, thus implicating the interstate and foreign commerce.

> All matters -- all of those matters that took place with the communications did affect interstate commerce, and the defendant at all points in time was here in the Southern District of Florida.
>
> Thank you, Your Honor.
>
> THE COURT: Mr. Sclafani, do you take any exception or objection to the facts as summarized?
>
> MR. SCLAFANI: The facts as summarized are accurate, Your Honor.
>
> With respect to the meeting that had been urged by the undercover, Mr. Cintron had indicated prior to that time that he would not be making the meeting. They didn't think he would, and it turned out that he did not, so - - but essentially, correct, and does not affect the factual basis supporting his plea.

Defense counsel correctly anticipated an important aspect of the case as regards sentencing, when he pointed out that Cintron had abandoned any interest in meeting with the thirteen (13) year old.

12. Cintron was allowed to remain out on the same conditions of pre-trial release pending sentencing. [CR-DE-85, p. 39]. Sentencing was set for September 20, 2007. [CR-DE- 60]. The original PSIR was prepared on August 21, 2007. [CR-DE-65].

13. On August 29, 2007, this Court granted Cintron's Motion for Extension of Time to File Objections to the PSIR. [CR-DE-64]. On September 6, 2007, Cintron filed a twelve (12) page Objection to the PSIR. [CR-DE-65]. Part of that Objection dealt with paragraph 27, which recommended a three (3) level enhancement for over 150 images. On September 19, 2007, the Government filed a Response to the Objections [CR-DE-67] In which they contended that there were over 150, but less than 300 images, so the objection to paragraph 27 should be overruled. On September 19, 2007, Cintron filed an eighteen (18) page Sentencing Memorandum. [DE-66].

14. On September 19, 2007, Cintron filed his Motion for Downward Departure. [CR-DE- 68].[3] On September 20, 2007, the sentencing was reset to October 11, 2007. [CR-DE-69]; [CR DE- 92][4]. On October 4, 2007, a revised PSIR was filed, increasing the amount of images to over 300 and causing a four (4) level enhancement In paragraph 27. On October 10, 2007, the Government filed a Supplemental Response [CR-DE-71] in which they argued that Cintron was responsible for over 300 images because six videos,

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[3] Cintron offered to work full time In advising parent/teacher organizations about being more vigilant with children's access to the Internet. He also argued that the sentence should not be out of the heartland of cases or vary from what he could have received in state court.

[4] The Court indicated that it should hear as much *as It could about Cintron's situation, so it could be fair. [CR-DE-92, p. 4].

each counting as 75 images, were involved. On October II, 2007, this Court granted Cintron's Motion to Continue Sentencing. [CR-DE-72]. Sentencing was reset to October 17, 2007.

15. On October 17, 2007, Cintron was sentenced to 180 months in prison. [CR-DE-74]. The sentence represented a slight downward variance from the advisory guideline range of 188- 235 months [CR-DE-86, p. 91]; [CR-DE-76]. The Government objected to any downward departure. [CR-DE-86, p. 91]. In this Motion to Vacate, Cintron has complained that this court seemed disinterested at sentencing. Yet, at sentencing, the Government was asked the following questions by the Court [CR-DE-86, pp. 91-97]:

> 1. Let's talk about what he has done and whether it warrants over 15 years in prison. He didn't meet with anybody, is that correct?
>
> 2. If you believe the polygraph examination, he has never molested a young girl since he has been an adult, is that correct?
>
> 3. If you believe the polygraph examination, he didn't intend to meet anybody in this case, is that correct?
>
> 4. Tell me what in the record indicates that he was going to meet with who he thought were very young girls.

> 5. Let me ask you: what's your reaction to 3553(a)(2)© which says that the Court shall consider whether it's necessary to protect the public from further crimes of the defendant, given Dr. Levenson's and Morin's opinion that he has a six percent chance of doing harm?

The Court then found that the aggravating aspect of the case was trying to send child pornography over the internet to children. [CR-DE-86, p. 104]. In mitigation, the Court found that although there may be more than a 6% chance of Cintron's engaging in child pornography in the future, that the chance of any physical exploitation of children was somewhat reduced compared to other individuals. [CR-DE-86, p. 106].

16. On October 26, 2007, current counsel filed a Notice of Appeal. [CR-DE-77]. On May 30, 2008, current counsel filed a Motion for Voluntary Dismissal with Prejudice because Cintron previously had agreed to an appeal waiver. [DE-20-2]. On June 30, 2008, Cintron's Motion to Dismiss his Appeal was granted by the Eleventh Circuit. [CR-DE-94].

17. On May 19, 2009, Cintron filed a timely Motion to Vacate. [DE-I]. He also filed a Sealed Motion for Recusal [DE-25] on that date. In that recusal request, Cintron claims that an October 8, 2000, incident involving the Court's son, that caused the Court to later testify in a state court case in 2001, should have been a basis for this Court's sua sponte recusal when it presided over Cintron's case in 2007, six years after the state court trial in State v. Milner

(Cintron also attached portions of the state court trial testimony[5]). Further, Cintron correctly indicates that the Court made a fifte :n (15) year recommendation as to sentencing which would have been reflected In the Milner Pre-Sentence Investigation Report. Moreover, Cintron correctly alleged that this Court was notified by the Florida Department of Corrections, in a letter dated December 8, 2005, that Milner was currently being monitored by a probation officer and that if he had any contact with my son that they should be notified. Cintron's April 27, 2008 Affidavit indicated that had he known of the Court's experience, where Its son was emotionally traumatized in 2000, that he would have requested that the Court recuse Itself. Cintron concluded that the Court was harsh and also opined that the Court was vindictive in denying a continuance. Finally, Cintron expressed an opinion that the Court seemed disinterested and cold at his sentencing. [DE-3]. On May 27, 2009, the Government filed a Response [DE-12], opposing the Motion For Recusal. On June 11, 2009, this Court denied the

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[5] Obviously, the Court is aware of and remembers most of its own testimony, a portion of which is contained in Exhibit "C" of [DE-27]. However, since the rule of witness sequestration was invoked and the Court was not present during Its son's testimony, there is no indication that the Court heard, had access to, or later even read the other trial testimony. This Court has no control over, and is unaware of, any allegations that Milner may have made post-sentencing in his state court case. Moreover, this court has no control over, influence with, or even awareness of the Clerk of Court for the Seventeenth Judicial Circuit's procedures for public access to their files.

recusal request. [DE- 21]. In that order, Cintron's name was inadvertently substituted at one point for Milner's name, at page 7.

DISCUSSION

18. In this timely Motion to Vacate, Cintron complains about Judicial bias, and he also complains that counsel was ineffective:

A. In failing to properly investigate the evidence and in failing to have a forensic examination of his computer.

(1). First, Cintron speculates that a forensic expert may have found fewer images on the computer.

(2). Second, Cintron speculates that a computer forensic expert could have determined the time frame during which the images were emailed.

(3). Third, Cintron says that such an expert could have determined the last time the materials were accessed and how many times each image was accessed.

(4). Fourth, Cintron states that a forensic expert could have determined how many "cached images" (CSC) were inadvertently

downloaded to his computer.

(5). Fifth, It is postulated that the expert could have determined whether Cintron was just generally looking for sexually explicit material, rather than material involving minors.

(6). Sixth, Cintron believes the validity of the search warrant may have been called into question.

(7). Seventh, an expert could have impeached Agent Bentolila's methods and qualifications.
As will be discussed later in this order, these speculative conclusions do not merit relief. At sentencing, the court was aware of the "possibility" that these images were on Cintron's computer without his knowledge. Any additional speculation from a forensic expert (like an opinion that CSC folders may be unknown to the user) could not have changed the court's finding that Cintron "not only was aware of those files on the computer, but that he had moved them around." [CR-DE-86, p. 90]. The same photos that Cintron had sent to the undercover officers, both child

> pornography and photos of an erect penis [CR-DE-86, p, 13], were found in the CSC files, and Cintron's comments to the undercover officers during the chats were consistent with the materials found in the CSC files, [CR-DE-86, p. 90]. Any forensic findings would not have changed the Court's conclusion that Cintron was aware of the CSC files. Additionally, any impeachment of Agent Bentolila's methods or qualifications would not have changed the court's conclusion, as his findings had been corroborated by other evidence. Finally, there has been no showing that any forensic findings on the computer, after seizure, would have invalidated the probable cause or validity of the search warrant.

B. In failing to negotiate a more favorable plea agreement.

C. In failing to advise him of the terms and effects of the plea, like the five (5) year minimum and a 5K1.1 motion.

D. In failing to properly advise him of his appeal waiver.

E. In failing to seek a recusal.

F. In failing to oppose sentencing enhancements for:

(1) 2G2.2(b)(3)(c) - distribution

(2) 2G2.2(b)(7)(D) - number of images (150) or 2G2.2(b)(7)(E) - 300 images

(3) 2G2.2(b)(2) - images of prepubescent

(4) 2G2.2(b)(4) - sadistic enchantment

G. In failing to articulate grounds for a downward departure or downward variance:

(1) Quasi entrapment caused isolated distribution.

(2) No regular practice of viewing.

(3) Unsolicited and unreviewed materials.

(4) No criminal history.

(5) Young graduate training for a productive job.

(6) Risk of prisoner abuse.

(7) Congress did not intend harsh penalties.

(8) Files were not organized or traded.

(9) Entrapment

H. In withdrawing objections to the PSIR.

I. In failing to call Bierman, the polygraph expert.

Cintron also complains that his plea was involuntary and that he received a disproportionate sentence that violates both equal protection and the Eighth Amendment. Finally, Cintron contends that the Sentencing Guidelines erode a defendant's right to a jury trial. This Court will attempt to address all of Cintron's complaints. Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992).

19. First, for the reasons set forth in this court's order of June 11, 2009, [DE-21], Cintron's complaints about judicial bias are not the basis for any relief. The perceived bias was too remote in time to warrant a reasonable concern about the Court's fairness.[6]

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[6] At first, Cintron argued that a reasonable person would believe that this Court could not be fair after the 2000 incident involving Its son. When the statistics show that this Court has imposed fair sentences after the incident, Cintron now has to argue that as time has passed, the Court has somehow gotten more biased because of the 2000 incident. Cintron has yet to explain how a December 2005

Moreover, there were distinct differences between Milner and Cintron and their cases. Milner committed an un-consented lewd act in front of a boy; Cintron seemed to be interested in only girls, who were ostensibly interested in him. The Court has no recollection as to whether Cintron, who would have been twenty-eight (28) years old in 2007, resembled Milner, who would have been thirty- three (33) years old in 2000. If one compares Cintron's 2007 photograph in his PSIR to Milner's current photograph in the Florida Department of Corrections website, no resemblance is noted. The PSIR does not indicate whether Cintron had any tattoos, while Milner clearly had a tattoo of the name, David, on his shoulder [DE-27, p. 29]. Moreover, Cintron advocates that an implied bias standard should be used. He argues that if an average man (like a juror) would be biased, then a recusal should occur. However, the appropriate standard involves whether a reasonable,[7] objective, disinterested observer, fully informed of the underlying facts would feel or have a reasonable doubt that the judge (who hopefully has more than an average man's

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notification of release would somehow trigger a suppressed bias. The statistics revealed in this Court's Order of June 1, 2009 establish a continued pattern of sentencing at the low end of the guidelines (with one downward departure). [DE-2I, p. 10].

[7] A reasonable person is not someone who is hypersensitive or unduly suspicious. U.S. v. Holland, 519 F.3d 909, 913 (9th Cir. 2008). Cintron and his family's subjective fears [DE-37, p. 11 n. 4] are not necessarily those of a well-informed, thoughtful observer.

abilities) would not be able to carry out his Judicial responsibilities with integrity, impartiality and competence. U.S. v. Carlton, 534 F.3d 97, 100 (2d Cir.) cert. denied, 129 S. Ct. 613 (2008). Judges, although human, should hopefully be expected to have qualities beyond just an average person. This Court refuses to set a low standard of recusal so that if an average person might be biased in a situation, then a reasonable person viewing the situation would conclude that a judge also would be biased in that situation. Any motion for recusal in 2007, whether based upon a statutory or due process violation, would have been denied.

20. Second, Cintron states that counsel was ineffective in not properly investigating the case. He details apparently seven (7) ways that the investigation was defective. Most of the complaints deal with ways that the investigation may have been helpful at sentencing. Those speculative complaints will be addressed later in this order.

A. He also contends that the flawed investigation caused him to enter an involuntary plea. Yet, during his plea colloquy, Cintron confirmed that he was giving up any and all defenses in the case by pleading guilty, including any argument that his expert should have been allowed to do a more thorough examination. [CR-DE-85, p. 32]. He also conceded that he was waiving his right to appeal, including rulings by the court on such issues as not allowing the expert unlimited access to the computer, motions to suppress and motions in limine. [CR-DE-85 p. 19]. The Court even asked Cintron:

> Now, Mr. Sclafani has only been working on your case for a period of time. Do you understand that by pleading guilty here today you may not be giving him a chance to finish any investigation that he might have otherwise wanted to have conducted. Is this what you want to do, plead guilty and finish up the case here today, except for sentencing in September? [CR-DE-85, p. 26].

Cintron answered, "Yes, Your Honor." Id. Finally, the Court informed Cintron that if he went to trial and was convicted that he could preserve a point on appeal that the court erred in denying a request for a continuance, or in not giving his lawyer and expert more time to get ready. Id at 26. Cintron confirmed that he understood that he was giving up that defense. Moreover, Cintron confirmed that he had had enough time to discuss with his attorney the nature of the charges, any possible defenses that he might have and his chances of winning his case at trial. [CR-DE-85, p. 27]. Cintron voluntarily entered his plea, waiving any complaint that counsel was unprepared. Cintron has not overcome the heavy burden of showing that his sworn statements in the plea colloquy were false. U.S. v. Haunng, 790 F.2d 1570, 1571 (11th Cir. 1986). Ordinarily, a defendant is stuck with the representations that he, himself, makes in open court at the time of the plea. U.S. v. Padilla-Galarza, 351 F.3d 594, 598 (1st Cir. 2003); U.S. v. Lemaster, 403 F.3d 216, 221 (4th Cir. 2005). Here, Cintron fails to give a compelling explanation for his contrary, sworn statements made during the plea colloquy. U.S. v.

Peterson, 414 F.3d 825, 827 (7th Cir.) cert. denied, 546 U.S. 995 (2005). Cintron also indicated he was satisfied with his counsel. [CR DE- 85, p. 26]. Here, Cintron had the option of proceeding to trial with counsel, who admittedly was not as prepared as he wanted to be, and without the benefit of a forensic computer expert, but preserving his right to appeal this Court's adverse rulings on continuance motions. Cintron voluntarily elected to gamble with a plea agreement, and forego any complaints about counsel or this court's pretrial rulings. That decision was made knowingly, intelligently, and voluntarily. Any pressure involved with that "Hobson's Choice" did not make the plea involuntary. U.S. v. Swick, 262 F.3d 684, 686 (8th Cir. 2001); Doe v. Woodford, 508 F.3d 563,569-70 (9th Cir. 2007). Cintron should not be allowed to change his mind after his gamble did not turn out as favorably as he had hoped.

B. Additionally, Cintron's speculative allegations about what an expert may have located on his computer do not merit any relief. Although the speculative expert findings could have conceivably been arguments to alter the advisory guideline range, they certainly would not have affected the guilt phase of the case. The Court will later discuss the sentencing phase, but first as to the guilt phase:

> (1) The experts proposed, possible testimony would not have affected the validity of the search warrant. Before the search warrant was ever served, the police had sufficient evidence to arrest and convict Cintron. He had already sent child pornography to California on October 27,

2006 and to Ohio on November 5, 2006. [CR-DE-85, p. 33]. Those pictures had been sent from Nelson Cintron's internet protocol address (IP). Cintron's driver's license photograph matched the photograph that had been sent from the same IP address on previous occasions. [CR-DE-51-5]. He sent pornographic pictures (male holding an erect penis) to each of the three undercover officers [CR-DE-86, p.13]. Cintron sent child pornography to officers that he believed were 13 or 14 year old girls; he sent a picture of himself, and the IP address was his. At the plea, trial counsel correctly conceded that Cintron and his family had analyzed that the Government, through its undercover agents, would have introduced more than a sufficient case and placed Cintron in a very difficult position before a jury, even if all his motions had been granted. [CR-DE-85, p. 38]. Nevertheless, Cintron speculates that a forensic computer evaluation may have called into question the validity of the search warrant, clearly a non-dispositive issue. As previously indicated, the search warrant was not necessary to a conviction in this case. Moreover, the search warrant was clearly valid; items actually seized pursuant to a search warrant do not impact the probable cause that either existed or did not exist at the time that the warrant was signed. This Court has reviewed the affidavit for the search warrant [CR-DE-51-5]; it established probable cause for the issuance of the search warrant. Cintron apparently contends that a later possible forensic conclusion of a possible

lack of images on the hard drive would somehow have called into question he validity of the warrant. Cintron seems to contend that a Court would question whether he ever sent the images to the undercover policemen, if they were not later found on the hard drive. Cintron concludes that without the images having been sent to the policeman, there would be no probable cause for the search warrant. Cintron's proposed argument for a successful motion to suppress does not explain how the undercover officers would have gotten his IP address, without his having communicated with them. It also would have to ignore Cintron's sending his picture to the officers, who were acting in the role of thirteen (13) and fourteen (14) year olds. Here, the search warrant was valid: any forensic examination would not have changed that conclusion.

(2) Certainly, a forensic examination would not have assisted Cintron's complaints about:

(a) the probable cause being stale (in a continuing criminal episode, staleness is less stringently applied, U.S. v. Holt, 2008 WL 5191476 *8 (M.D. Fla. November 13, 2008); U.S. v. Prideaux-Wentz, 543 F.3d 954, 958 (7th Cir. 2008); U.S. v. Terry, 522 F.3d 645, 650 (6th Cir.) cert. denied, 129 S. Ct. 235 (2008)),

(b) the search of the vehicle (there is no allegation that any incriminatory evidence was seized out of his car, in fact, it was represented

that nothing was seized from the car [CRDE- 58, p. 2]),

(c) no return of inventory (the failure to return and file a search warrant is ministerial and does not affect the validity of a search, U.S. v. Wilson, 451 F.2d 209, 214 (5th Cir. 1971) cert. denied, 405 U.S. 1032 (1972),

(d) scope of the search too broad (the warrant was sufficiently particular, U.S. v. Brooks, 427 F.3d 1246, 1253 (l0th Cir. 2005) cert. denied, 546 U.S. 1222 (2006) and if it were a close call, the good faith exception would have applied, U.S. v. Travers, 233 F,3d 1327, 1330 (11 th Cir. 2000) cert. denied, 534 U.S. 830 (2001), and

(e) a Franks violation (the omission was not material, U.S. v. Sarras, 2009 WL 2176643 *22 (11th Cir. July 23, 2009); and the remainder of the affidavit established probable cause, U.S. v. Kapordelis, 569 F.3d 1291, 1309 (11th Cir. 2009). Moreover, we will never know the Government's position on the merits of this filed Motion to Suppress Warrant, as it was not filed until calendar call, and Cintron pled guilty the next business day, waiving any complaint about the motion.

(C). Trial counsel was an experienced criminal defense attorney and a former federal prosecutor. He had been practicing for thirty (30) years. [CR-DE-91, p. 6]. Here, the presumption that experienced counsel's conduct was reasonable is even stronger than the

ordinary presumption afforded counsel. Stewart v. Sec'y, D.O.C., 476 F.3d 1193, 1209 (11th Cir. 2007). Moreover, because the standard for determining ineffectiveness of counsel is an objective one, Counsel's admissions at the calendar of deficient preparation matter little in resolving the issue. Jennings v. McDonough, 490 F.3d 1230, 1243 (11tb Cir. 2007) cert. denied, 128 S.Ct. 1762 (2008). Such an admission is not decisive. Grayson v. Thompson, 257 F.3d 1194, 1222 n. 15 (11th Cir. 2001) cert. denied, 536 U.S. 964 (2002). If such a statement were decisive, a judge would be hard pressed denying a continuance when a lawyer "threw himself on his sword." Cintron has not shown that no competent counsel would have taken these actions. Jones v. Campbell, 436 F.3d 1285, 1296 (11th Cir. 2006).

21. Third, Cintron complains that trial counsel failed to negotiate a more favorable plea agreement. He alludes to an offer of eIghteen (18) months in prison. In eleven (11) years on the federal bench, this court can not remember taking any pleas under Rule 11(c)(1)(c), Fed. R. Cr. Proc., that bind the Court to a sentence. Rather, the pleas that are tendered in this district are under Rule 11(c)(1)(b), Fed. R. Civ. Proc. and are only recommendations to the Court. It is highly speculative that the government would have offered an eighteen (18) month, agreed to sentence, that Cintron would have agreed to it, and this Court would have accepted it. Any deficient performance in failing to pursue that plea offer was harmless. Perez v. Rosario, 459 F.3d 943, 948 (9th Cir. 2006). Even Cintron has conceded that by proceeding with discovery, he caused the Government to re-evaluate the

alleged plea offer. Yet, defense counsel was able to achieve major concessions. For example, in the plea negotiations in this case, the Government agreed to dismiss Count One and Count Three at the time of sentencing. [CR-DE-61, P. 1], [CR DE- 85, p. 10]. Count One would have carried a maximum sentence of thirty (30) years in prison, with a five (5) year mandatory mimmum. Count Three carned a maximum sentence of ten (10) years in prison. [CR-DE-85, p. 10]. The government agreed to recommend a three (3) level reductIon for acceptance of responsibility. [CR-DE-85, p. 11].[8] The government also promised not to prosecute Cintron for online communications that he had with undercover detectives in Ohio and California. [CR-DE-85, p. 12]. The government also agreed to consider Cintron for substantial assistance [CR-DE-85, p. 14] which ultimately could have eliminated the five (5) year mandatory minimum. [CR-DE-85, p. 16]. It is pure speculation that defense counsel could have negotiated a more favorable plea agreement. Only by negotiating a plea only to Count Three, with its ten (10) year maximum, could defense counsel have been

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[8] Had Cintron not received a three (3) level reduction for acceptance of responsibility, he would have faced a recommended guideline range of 262-327 months, [CR-DE-86, p. 96] which could, in the absence of a plea agreement, have been imposed on Count One alone or on Counts Two and Three, with consecutive sentences, but see, U.S. v. Bobb, 2009 WL 2391918 (11 th Cir. August 6, 2009). Where the government does not prosecute some crimes and the Defendant receives a sentence ten (10) years less than he faced at trial,.no ineffectiveness has been shown. U.S. v. Kurti, 427 F.3d 159, 163 (2d Cir. 2005).

able to achieve a more favorable disposition. One must remember that this case was originally going to be prosecuted in state court until a decision was made to seek a federal indictment, which apparently carried more significant penalties. Cintron speculates that counsel, who unsuccessfully tried to keep the case in state court, should have somehow been able to secure a more favorable plea offer from the government. This speculative complaint is not valid.

22. Fourth, the Court explained to Cintron both the five (5) year minimum and substantial assistance. Cintron was clearly aware of the five (5) year mandatory minimum. [CR DE- 85, pp. 7, 9, 16-17, 28]. The Court also adequately explained substantial assistance. [CR-DE 85, pp. 14-16]. See U.S. v. Regenos, 405 F.3d 691, 693-94 (8th Cir. 2005). Cintron was aware that it was up to the sole and un-reviewable discretion of the prosecutors to determine whether to file a substantial assistance motion, giving this court the discretion to impose a downward departure or variance. The Government does not have to reward criminals who co-operate with it with a lighter sentence. U.S. v. Richardson, 558 F.3d 680, 682 (7th Cir. 2009). There is no showing that Cintron provided substantial assistance. No error has been shown.

23. Fifth, Cintron complains that trial counsel improperly advised him about the appeal waiver. However, this Court explained the waiver of appeal to Cintron. [CR-DE-85, pp. 18-20, 26]. Additionally, the written, signed plea agreement contained a waiver of appeal provision. [CR-DE-61, p. 6]. Cintron agreed that he had read and discussed the plea agreement with

counsel. [CR-DE-85, p. 8]. The Court found that Cintron had knowingly, intelligently and voluntarily waived his right to an appeal. [CR-DE-85, p. 39]. Cintron was twenty-eight years old with an MBA and involved m the mortgage business. [CR-DE-85, p. 22]. There is no reason to believe that he could not understand the plea agreement or the Court's questions during the plea colloquy.

24. Sixth, Cintron contends that trial counsel erred in not seeking a recusal. Assuming that counsel should have known about the alleged grounds for recusal (Cintron apparently imputes knowledge to the Government's prosecutor because he believes disclosures were made by this Court in earlier cases), his failure to do so cannot be deemed to be substantially below that of reasonably competent attorneys in the community. In this Court's June 10, 2009 order denying recusal [DE-21], this court listed nineteen (19) subsequent cases with somewhat similar charges, and in none of those cases was a recusal motion filed. Either the counsel were unaware of the incident or, if aware, decided not to file a recusal motion, that could have resulted in a transfer to another district judge, usually another judge sitting in Ft. Lauderdale: Judge Zloch, Judge Cohn or Judge Marra. Cintron has not shown that no objectively competent lawyer would have acted the way trial counsel did in this case. Van Poyck v. Fla., D.O.C., 290 F.3d 1318, 1322 (11th Cir.) cert. denied, 537 U.S. 812 (2002). Cintron has not shown that a recusal motion would have been granted.

25. Seventh, the failure to object to an improper

enhancement equals ineffective assistance of counsel. U.S. v. Otero, 502 F.3d 331, 336 (3d Cir. 2007); U.S. v. Horey, 333 F, 3d 1185,1188 (10th Cir. 2003). Here, sentencing enhancements were supported by the record.

A. Paragraph 23 of the PSIR recommended a two level enhancement for prepubescent minors pursuant to 2G2.2(b)(2). Defense counsel's original objection was withdrawn. [CR-DE-86, p. 4]. Had it not been withdrawn, the Court would have viewed the images, which may have been counter-productive to Cintron's receiving a lenient sentence. Counsel can not be faulted for having a strategic reason not to object to an enhancement. U.S. v. Mendez-Cruz, 329 F.3d 885, 891 (D.C. Cir. 2003). Cintron also contends that the images may have been of virtual, not real children. Yet, he gave up that defense when he pled guilty. [CR-DE-85, p. 36]. Moreover, one of the sent images, SEA.JPG, depicted a prepubescent female from a known child pornography series. [CR-DE-55-5, p. 8]. Cintron even pled guilty to sending that depiction. [CR-DE-85, p. 27], Additionally, the government contended that two of the images were of known victims who were between five and eight years old when the pictures were taken. [CR-DE-86, p. 11]; [CR-DE-67, p4]. In the face of this evidence, it is not probable that no

reasonable Juror would find Cintron guilty, no matter what an expert might now say. U.S. v. Cervini, 379 F.3d 987, 993(10th Cir. 2004) cert. denied, 544 U.S. 904 (2005).

B. Paragraph 24 of the PSIR recommended five level enhancement for distribution to a minor pursuant to 2G2.2(b)(3)(c). Originally, probation had recommended a seven (7) level increase pursuant to G2.2(b)(3)(E), but after defense counsel's objection, It was reduced to a five (5) level enhancement. [CR-DE-86, p. 4]; [CR-DE-86, p. 103]. Cintron received the benefit of the doubt when he did not show up to meet Tiffanycutie2, even though Tiffanycutie2 had failed his test on January 17, 2007 when she could not name the class president for her high school. [CR-DE-71-14]. Certainly, there was support for this five (5) level enhancement, as Cintron clearly distributed the images that he sent to the undercover officers.

C. Paragraph 25 of the PSIR recommended a four level enhancement for sadistic conduct pursuant to 2G2.2(b)(4). Factually, the Court found that Cintron knew about the files contained in the CSC files. [CR-DE-86, p.90]. Moreover, one of the sent e-mails, UNTITLED JPG, depicted a prepubescent female with her

vagina being penetrated by an object. [CR DE- 55-5, p. 8]. Such an image warrants a sadistic enhancement under the law. U.S. v. Garrett, 190 F.3d 1220, 1224 (11th Cir. 1999); U.S. v. Bender, 290 F.3d 1279, 1286 (11th Cir.) cert. denied, 537 U.S. 1037 (2002). Moreover, expert testimony is not required. U.S. v. Hall, 312 F.3d 1250, 1263 (11th Cir. 2002) cert. denied, 538 U.S. 954 (2003).

D. Paragraph 26 of the PSIR recommended a two level enhancement because of use of a computer pursuant to 2G2.2(b)(6). Cintron does not complain about this enhancement in his motion to vacate.

E. Paragraph 27 of the amended PSIR recommended a four (4) level enhancement for over 300 Images pursuant to 2G2.2(b)(7)(c). According to the Government, Cintron admitted to possessing two videos, which alone equates to 150 images. [DE-14, pp. 2-3]. When arrested on January 22, 2007, Cintron admitted to possessing twenty-five (25) images and four (4) videos that someone had sent him. [CR-DE-71-17, pp. 9, 32];[DE-67, p. 3]. The testimony at the sentencing hearing supported the enhancement for over 300 images.[CR-DE-86, pp. 90-91].

26. Eighth, Cintron complains that trial

counsel"[9] failed to articulate grounds for a downward departure or variance. However, trial counsel presented a proposed program that could have been a ground for downward departure: Students Against Poor Internet Decision (SAPID). [CR-DE-86, p. 89]. Even in a capital case, counsel is not required to present every non-frivolous defense, nor is counsel required to present all mitigation evidence. Chandler v. U.S., 218 F.3d 1305, 1319 (11th Cir. 2000) cert. denied, 531 U.S 1204 (2001). The Court considered the factors in 18 USC § 3553(a). [CR-DE-86, pp. 104-106]. Here, based upon the totality of circumstances, trial counsel's arguments for mitigation were reasonable. Crawford v. Head, 311 F.3d 1288, 1314 (11th Cir. 2002) cert. denied, 540 U.S. 956 (2003). In this Motion to Vacate, Cintron has advanced a laundry list of possible grounds for mitigation. None would have been successful. He cites U.S. v. Gray, 453 F.3d 1323, 1325 (11th Cir. 2006), but in that case the appellate court

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[9] Trial counsel also successfully objected to the Court's considering a prior speeding ticket. [CR-DE-86, p. 70]. He unsuccessfully tried to lobby the government to leave the case in state court. [CR-DE-86, p. 79]. Trial counsel reminded the Court of the strong support that Cintron had from the community. [CR-DE-86, p. 85]. He successfully convinced the Court to conclude that Cintron did not intend to physically meet any of these thirteen (13) or fourteen (14) year olds. That conclusion was suspect given Cintron's effective cross examination of Tiffanycutie2 on January 17, 2007, when she could not tell him the name of her class president. Absent that conclusion, it is unlikely this court would have imposed a downward variance, or even a sentence at the low end of the guidelines range.

approved the district court's using discretion in imposing a downward variance. Gray does not mandate a below the guidelines sentence, and this Court obviously recognized it had the discretion to do so. Gray does not dictate that a variance is necessary, and it certainly does not control the appropriate extent of any variance. In discussing Gray, the Eleventh Circuit has said that they have "typically treated child sex offender cases as serious crimes, upholding severe sentences" U.S. v. Pugh, 515 F.3d 1179, 1202 (11th Cir. 2008). Other judges may be receptive to those grounds, but under the recent Supreme Court rulings, everything does not fall to the lowest common denominator. Other judges may impose lower sentences because pedophiles are more at risk in prison than other inmates, that does not mean that such an argument would have been successful here. It would not. This Court expects the Bureau of Prisons to protect inmates appropriately. Here, Cintron pled guilty, not just to distributing child pornography, but to distributing child pornography to children, in hopes that they would reciprocate by furnishing him pornographic photographs of themselves. That aggravating factor overshadows Cintron's proposed reasons for mitigation.

27. Ninth, Cintron complains that counsel erred in withdrawing objections to the PSIR. However, if the photos showed penetration of a child, counsel can hardly be faulted for using strategy to avoid the court's viewing what might, to some, be disturbing photos. Clearly, counsel had a strategy to avoid the court's viewing the photos or videos. [CR-DE-86, p. 5]. Counsel can not be faulted for utilizing that strategy.

Mendez-Cruz at 891.

28. Tenth, Cintron complains that counsel erred in not calling witnesses. However, the gist of their testimony was presented to the Court. [CR-DE-86, p, 81], If the Court had been interested in hearing from the polygrapher,[10] he was present. [CR-DE-86, p. 101]. The polygrapher's testimony would not have changed this Court's sentence. The Court gave Cintron the benefit of the doubt on those issues, even though at 8:09 P.M. on January 19, 2007, Cintron had told Tiffanycutie2, "I still don't know if I'm going to come, cause you know it's illegal to meet minors." [CR-DE-66-2]. Had the polygrapher been called and cross-examined, only the same or a worse case scenario could have resulted. The Court also had the benefit of Dr. Morin and Dr. Levenson's five (5) page report, [CR-DE-66-4], and relied partially on their findings as a mitigating factor.

29. Eleventh, Cintron complains that his plea was involuntary. Yet, in light of the probable outcome of a trial, he cannot show that he would have gone to

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[10] Polygrapher Leonard Bierman's five (5) page report was attached to the PSIR, and a nine (9) page copy was filed. [CR-DE-66-3]. Bierman's subjective opinion about the sentencing hearing is not persuasive. Also attached to the PSIR were letters from the Defendant, his father, his mother, Marc Braunstein, Virginia Johnson, Diana M. Rogers, Robert and Deborah Shumate, Edmund Cuison, Judy Gonzalez, Larry Porche, Shannon Ramos, Maria Torres, Adrienne Wahl, Liza and Silvio Armando, Liza Grijalba, Silvio Guevara, and Lindsay S. Koehler.

trial in this case. del Toro v. Quarterman, 498 F.3d 486, 490 (5th Cir. 2007) cert. denied, 128 S. Ct. 1478 (2008). It is highly doubtful that Cintron would have traded a three (3) level reduction for acceptance of responsibility for the privilege of a trial with a virtually certain adverse result. Bethel v. U.S., 458 F.3d 711, 720 (7th Cir. 2006) cert. denied, 549 U.S. 1151 (2007). Moreover, he repeatedly indicated that he wanted to plead guilty and throw himself on the mercy of the court. [CR-DE-85, pp. 3, 6-7, 8-9, 13-14, 27, 30, and 38]. He also indicated he was satisfied with his counsel. [CR DE- 85, p. 26]. See Short v. U.S., 471 F.3d 686, 692 (6th Cir. 2006). Cintron indicated that he had had enough time to make a decision. [CR-DE-85, pp. 4, 27]. He understood the plea agreement. [CR-DE-85, p. 7-8]. No promises had been made. [CR-DE-85, pp. 8, 25-26]. Cintron did not need anymore time to consult with his attorney. [CR-DE-85, p. 21-22]. He realized he would not be able to withdraw his plea later. [CR-DE-85, pp. 5-6, 6, 12, 12-13, 16 and 17]. He contends that he did not understand an entrapment defense or the sentencing guidelines. Cintron asserts that he was promised little prison time if he pled guilty. However, the record belies those assertions.

> A. The Court explained to Cintron that by pleading guilty that he was giving up any and all defenses to the charge. Cintron was specifically told that his lawyer could have argued that the undercover police officers entrapped him, that he did not have a predisposition to commit the crime. [CR-DE-85, p. 36]. It is clear that an entrapment defense in this case was unlikely to be successful. In the

probable cause affidavit for the search warrant, it is clear that it was Cintron, not the undercover officer, pretending to be a fourteen (14) year old girl (TINAGREENEYES), who first sent an instant message in the chat room. Cintron said that he had pictures to show. On July 29, 2006, Cintron begins this instant message with "Hot 27M wit pics and cam for show... u got pics too???" [CR-DE-71-2]. When a fourteen (14) year old girl responds, Cintron says, "ur not so innocent are u." When Cintron signed on a month later, he asked whether TINAGREENEYES wanted to see naughty pictures. "i have naughty pics too...u want to see those or no?" [CR-DE-71-3]. The girl responded that she had never seen such pictures but that would be cool. Cintron asked, "of my dick?" When the "girl" said cool, he sent two pictures depicting an erect penis. Cintron lamented that it was "too bad ur not near by... id let you see it in person." Then Cintron asked, "would you let me see you naked too?" Cintron responded that he had seen girls her age naked before because they showed him, both in pictures and in person. Cintron offered to let TINAGREENEYES "play with it and jerk a guy off." When asked how she could get pictures, Cintron indicated that he had naked pictures of other girls her age. After an aborted effort to contact her in October, Cintron again contacted TINAGREENEYES on November 5, 2006, and asked if she had "any showin a lil more skin" Cintron then said he had seen naked pictures of girls even younger than her. Three e-mails containing pictures of

pre-pubescent females with exposed vaginas, one of which was being penetrated by an object, were sent to TINAGREENEYES by Cintron. Cintron said that one girl was 11 or 12 and had a dildo in her hand. [CR-DE-71-5].Cintron then said that he would let her pull his dick and play with it if they lived close. Cintron asked, "y don·t u cum visit me." He finished by saying twice that he would put his dick in her pussy. Within eleven (11) minutes of the chat beginning on November 5th, Cintron had e-mailed the child pornography, hardly a situation of his being entrapped, but rather a situation showing a predisposition. Meanwhile, on October 16, 2006, Cintron had independently sent pictures of his penis to Calbritany93, a policeman pretending to be a thIrteen year old girl. [CR-DE-71-9]. On October 27, 2006, Cintron sent pictures of child pornography to Calbritany93, asking her to rub herself. [CR-DE-71-10]. When arrested, Cintron admitted to having sent child pornography for one and one half to two years [CR-DE-71-17, p. 25] and to having done it five to ten times. [CR-DE-71- 17, pp. 11.28]. Entrapment was not a viable defense.

B. Cintron asserts that he did not understand the sentencing guidelines. Yet, guideline factors were explained to him. [CR-DE-85, p. 5]. He was told that he could challenge the guideline computation. [CR-DE-85, p. 5]. Departures and variances were explained. [CR-DE-85, p. 6]. Cintron was told that the guidelines were

advisory. [CR-DE-85, p. 7]. He understood that the court could impose a more severe sentence. [CR-DE-85, p. 8]. He understood that the lawyer's recommendations were persuasive, not controlling, on the Court. [CR-DE-85, p. 12].

C. Cintron confirmed that no promises had been given him. [CR-DE-85, pp. 8, 25-26]. He was told that everyone might think the sentence was unfair, except the Court. [CR-DE- 85, p. 3]. It was up to the Court to decide what a reasonable and sufficient sentence was, which could be anywhere from five (5) to twenty (20) years in prison. [CR-DE-85, p. 7]. Cintron knew that the sentence actually imposed could be different from any estimate his lawyer may have given him. [CR-DE-85, p. 5]. He knew that if he received a higher sentence than he had been hoping for, that would be a chance he was taking, and he could not withdraw his plea. [CR-DE-85, p. 5-6]. The Court could impose an upward departure. [CR-DE-85, p. 6]. The plea agreement represented any understanding that Cintron had with the Government. [CR-DE-85, p. 8]. He had read and discussed the plea agreement with counsel. [CR-DE-85, p. 8]. Paragraph 15 of the plea agreement recognized that any estimate from his counsel as to what the sentence might be was not binding on the Court. [CR-DE-61, p.7]. Cintron was told that the lawyer's recommendations were persuasive, not controlling on the Court. [CR-DE-85, p. 12]. Defense counsel's conjectures about sentencing are irrelevant where the written plea agreement

and plea colloquy established the Defendant's maximum exposure. U.S. v. Shedrick, 493 F.3d 292, 299 (3d Cir. 2007).

30. Twelfth, Cintron complains that his sentence was disproportionate and violative of the Eighth Amendment to the U.S. Constitution. Here, there was no showing that other defendant's circumstances exactly paralleled Cintron's. U.S. v. Vargas, 477 F.3d 94, 100 (3d Cir.) cert. denied, 128 S. Ct. 199 (2007). Additionally, there is no Eighth Amendment Violation unless the sentence is grossly disproportionate. U.S. v. Looney, 532 F.3d 392, 396-97 (5th Cir.) cert. denied, 129 S. Ct. 513 (2008). In U.S. v. Neston, 304 Fed. Appx. 821 (11th Cir. 2008) cert. denied, 129 S. Ct. 2783 (2009), the Court upheld a two hundred-forty (240) month sentence in a similar case. Finally, this Court does not quite understand the relevance of Cintron's sentence to an uncharged former Congressman's absence of prosecution. Where there has been no prosecution, there are no sentences to be compared.

31. Thirteenth, Cintron complains that the Sentencing Guidelines erode a defendant's right to a jury trial. It usually takes a court with a much higher pay grade than this one to declare the guidelines to be unconstitutional. This Court declines to do so.

32. Cintron seeks a motion to compel examination of the computer. [DE-2]. There is no right to discovery in a habeas petition. Arthur v. Allen, 459 F.3d 1310 (11th Cir. 2006). Discovery is extremely limited. Glascoe v. Bezy, 421 F.3d 543, 549 (7th Cir.

2005). No good cause has been shown. Any proposed forensic findings would not have altered the sentence. Cintron independently admitted to possessing at least one hundred-fifty (150) images (two videos) or four videos (three hundred (300) images) [CR-DE-71-17, p.32].. The time frame when Cintron sent images to the officers was proved through the officer's testimony about receipt. The last time the images were viewed and the number of viewings would not have been a reason for this court to impose a downward departure or variance. A forensic examiner's opinion that Cintron was seeking generally sexually explicit material, rather than child pornography, would have been disregarded, as Cintron's actions and conversations, with officers he thought were young girls, would have been better evidence of his true interest. No deviation from the guidelines would have been imposed, simply because an expert would opine that Cintron primarily sought out adult pornography. Cintron thought he was sending pornography and child pornography to at least three (3) thirteen (13) year old girls; he had graphic sexual conversations with them. The speculative forensic testimony, if produced, would not have changed the sentence. The requested examination is not appropriate.

33. Evidentiary hearings on motions to vacate are the exception and not the norm; there is a heavy burden on Cintron to demonstrate that a hearing is warranted. Moreno-Morales v. U.S., 334 F.3d 140, 145 (1st Cir. 2003). An evidentiary hearing is not needed where Cintron's allegations are conclusively refuted by the record. Heldman v. U.S., 527 F.2d 20, 22 (10th Cir. 1975). When a court can conceive of a reasonable

motivation for counsel's actions, It can deny a claim of ineffective assistance of counsel without an evidentiary hearing. Gordon v. U.S., 518 F.3d 1291, 1302 (11th Cir. 2008).[11]

CONCLUSION

Cintron voluntarily pled guilty in a difficult defense case, His lawyer aggressively advocated for him, and he did the best he could in the circumstances. Efforts to "Monday Morning Quarterback" the case are not appropriate. Cintron had the capable assistance of competent counsel. Cintron's real complaint is with Congress and the Sentencing Guidelines. If Cintron is correct that there should be a public outcry about these types of sentences, then maybe Congress will change the law, and Cintron could petition for relief through a motion under 18 U.S.C. §3582, should a change occur in the guidelines, that is given retroactive application. Here, no error has been shown.

Wherefore, Cintron's Motion to Vacate [DE-I] is Denied. Cintron's Motion to Compel Discovery [DE-2] is Denied. Cintron's request for an evidentiary hearing [DE-I-2] is Denied.

The Clerk shall deny any pending motions as moot and close this case.

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[11] Cintron cites Gallego v. U.S., 174 F.3d 1196, 1198-99 (11th Cir. 1992), but in that case there was an evidentiary hearing and the ineffectiveness concerned a trial, not a plea where the defendant had gone through a plea colloquy.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of August, 2009.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-60740-CIV-DIMITROULEAS
(07-60049-CR-DIMITROULEAS)

NELSON CINTRON,
Movant,
v.
UNITED STATES OF AMERICA,
Respondent.

ORDER

THIS CAUSE is before the Court on Movant's May 19, 2009 Sealed Motion For Recusal. The Court has considered the Government's May 20,2009 Response [DE-I2], Movant's June 5, 2009 Reply, [DE-15], the transcripts of Calendar Calls, Movant's Plea and his Sentencing, the Pre-Sentence Investigation Report (PSIR), and having presided over this cause, find as follows:

1. On March 6, 2007, Cintron was indicted and charged with Attempted Enticement of a Minor in Violation of18 U.S.C. § 2422(b), Distribution of Child Pornography in violation of 18 U.. S.C. § 2252A(a)(2)(A) and Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). [CR-DE-I].

2. On March 30, 2007, a trial date of April 30, 2007 was set. [CR-DE-22]. On March 27, 2009, Judge Seltzer entered a Discovery Order which required

motions to be filed within 28 days. [CR-DE-2l]. At a status conference held before Judge Snow on April 11, 2007, it was represented that Cintron would be ready for trial by mid-summer. [CR-DE-25]. At the Calendar Call held on April 27, 2009, Cintron did not appear. Nevertheless, the Court granted a defense[12] continuance with the provision that Cintron file a written speedy trial waiver.[13] The trial was reset to July 9, 2007. [CR-DE-30].

3. On May 16,2007, this Court granted the Defense Motion for Extension of Time to File Pre-Trial Motions [CR-DE-34]. The deadline was reset to June 6, 2007.

4. On July 6, 2007, this Court denied Cintron's renewed motion for a continuance. [CR DE-54]. The Court also was aware of the fact that the Government was not ready for trial. [CR DE-91, p. 3]. Moreover, the Court indicated that if the Government were not ready, It could move to dismiss the charges. [CR-DE-91, p. 3]. However, the Court offered to start the trial a day later. [CR-DE-91, p. 7].

5. On July 9, 2007, Cintron pled guilty to: Count Two, Distribution of Child Pornography [CR-DE-59] pursuant to a plea agreement [CR-DE-61]. Cintron was aware of the statutory maximum of twenty (20) years and the minimum sentence of five (5) years.

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[12] Counsel asked for a continuance at least until July. [CR-DE-90, p. 2].

[13] Cintron filed the waiver that afternoon. [CR-DE-31].

[CR-DE-61, p. 2]; [CR-DE-85, p. 4]; [CR-DE-85, p. 9]. Pursuant to the agreement, no further charges were to be filed by law enforcement officers in Ohio and California. [CR-DE-61, p. 4]; [CR-DE-85, p. 12]. Cintron waived his right to take an appeal. [CR-DE-61, p. 6]; [CR-DE-85, pp. 18-20, 26, 31-32]. The Court granted an ore tenus motion to amend Cintron's name in the indictment. [CR-DE-62]; [CR-DE-85, p. 21]. By pleading guilty, Cintron understood that he was giving up any complaints about the court's denial of his request for continuance, [CR-DE-85, pp. 26-27], or that his lawyer or expert should have been allowed more time. [CR-DE-85, p. 32]. Cintron gave up any and all defenses to the charge. [CR-DE-85, pp. 36-37].

6. The following factual basis was presented at the plea colloquy:

> THE COURT: And would the Government summarize the facts as to Mr. Cintron's case?
>
> MR. BROWN: Yes, Your Honor. If this case were to go to trial, the Government would be prepared to prove that beginning in July of last year, July 29 of 2006, Chief Dan Haueter, H-a-u-e-t-e-r, of the new Waterford Police Department in new Waterford, Ohio was conducting an undercover online investigation. And on that date this defendant made contact with Chief, who was portraying himself as a 14-year-old girl from Ohio. There were several

communications between the defendant and Chief Haueter. Those communications were sexually graphic in nature and those communications continued through January of 2007.

During the time that he was -- that the defendant was communicating with Chief Haueter, he also was communicating with an individual who he believed to be a 13-year old girl in California bearing the e-mail address of Calbritany93 (phonetic). It is now understood that Calbritany93 was also an undercover officer out in California.

As a result of the conversations with Calbntany93 and Chief Haueter, who he e-mail address was Tinagreeneyesl4 (phonetic), the defendant had the occasion on October 27th, to Calbntany93 and on November 5th to Tinagreeneyes14, to transmit and send Via the Internet three images, each of those containing child pornography as that term is defined in Title 18, United States Code, 2256.

As a result of these conversations and communications with Tinagreeneyes14, Chief Haueter was able to ascertain the identity and location of the defendant. Once he determined that the defendant was located in the South

Florida area, he turned the defendant over to another undercover officer here in Broward County who was using the screen name Tiffanycutie2 (phonetic), also posing as a 13-year-old girl.

The defendant began to communicate with that e-mail address, the person he thought was a 13-year-old girl, in extremely graphic nature beginning on December 31, of 2006, and continuing through January 20th of this year.

As a result of those conversations there was discussion about a meet between the defendant and who he believed to be a 13-year-old girl. That meet was to take place on January the 20th of 2007. And on the date and time of the proposed meet the defendant, however, did not appear for the meet.

All of the above listed activities took place, Your Honor, while the defendant was here in Broward County, in the Southern District of Florida, utilizing his AOL account or either instant messages account, which accounts caused all communications to be routed through Virginia and then on to either Ohio or California, thus implicating the interstate and foreign commerce.

> All matters - - all of those matters that took place with the communications did affect interstate commerce, and the defendant at all points in time was here in the Southern District of Florida.
>
> Thank you, Your Honor.
>
> THE COURT: Mr. Sclafani, do you take any exception or objection to the facts as summarized?
>
> MR. SCLAFANI: The facts as summarized are accurate, Your Honor.
>
> With respect to the meeting that had been urged by the undercover, Mr. Cintron had indicated prior to that time that he would not be making the meeting. They didn't think he would, and it turned out that he did not, so -- but essentially, correct, and does not affect the factual basis supporting his plea.

7. Cintron was allowed to remain out on the same conditions of pre-trial release pending sentencing. [CR-DE-85, p. 39]. Sentencing was set for September 20,2007. [CR-DE-60].

8. On August 29, 2007, this Court granted Cintron's Motion for Extension of Time to File Objections to the PSIR. [CR-DE-64].

9. On September 19, 2007, Cintron filed his

Motion for Downward Departure. [CR-DE- 68]. On September 20, 2007, the sentencing was reset to October 11,2007. [CR-DE-69]; [CR DE- 92][14] On October 11, 2007, this Court granted Cintron's Motion to Continue Sentencing. [CR-DE-72]. Sentencing was reset to October 17, 2007.

10. On October 17,2007, Cintron was sentenced to 180 months in prison. [CR-DE-74]. The sentence represented a slight downward variance from the advisory guideline range of 188- 235 months [CR-DE-86, p. 91]; [CR-DE-76]. The Government objected to any downward departure. [CR-DE-86, p. 91]. At sentencing, the Government was asked the following questions by the Court: [CR-DE-86, pp. 91-97].

> 1. Let's talk about what he has done and whether it warrants over 15 years in prison. He didn't meet with anybody, is that correct?
>
> 2. If you believe the polygraph examination, he has never molested a young girl since he has been an adult, is that correct?
>
> 3. If you believe the polygraph examination, he didn't intend to meet

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[14] The Court indicated that it should hear as much as it could about Cintron's situation so it could be fair. [CR-DE-92, p. 4].

anybody in this case, is that correct?

4. Tell me what in the record indicates that he was going to meet with who he thought were very young girls.

5. Let me ask you: what's your reaction to 3553(a)(2)(c) which says that the Court shall consider whether it's necessary to protect the public from further crimes of the defendant, given Dr. Levenson's and Morin's opinion that he has a six percent chance of doing harm?

The Court then found that the aggravating aspect of the case was trying to send pornography over the internet to children. [CR-DE-86, p. 104]. The Court also found that although there may be more than a 6% chance of Cintron's engaging in child pornography in the future, that the chance of any physical exploitation of children was somewhat reduced compared to other individuals. [CR-DE-86, p. 106].

11. On June 30, 2008, Cintron's Motion to Dismiss his appeal was granted by the Eleventh Circuit. [CR-DE-94].

12. On May 19, 2009, Cintron filed a timely Motion to Vacate. [DE-1]. He also filed a Sealed Motion for Recusal on that date. In that recusal request, Cintron claims that an October 8, 2000, incident involving the court's son that caused the court to later testify in a state court case in 2001 should have been a basis for this court's sua sponte recusal when it

presided over Cintron's case in 2007, six years after the state court trial (Cintron also attaches portions of the trial testimony[15]). Further, Cintron correctly indicates that the Court made a recommendation as to sentencing that would have been reflected in the Pre-Sentence Investigation Report. Moreover, Cintron correctly alleges that this Court was notified by the Florida Department of Corrections, in a letter dated December 8, 2005, that Cintron was currently being monitored by a probation officer and that if he had any contact with my son that they should be notified, Cintron's April 27, 2008 Affidavit indicates that had he known of the Court's experience, where Its son was emotionally traumatized in 2000, that he would have requested that the court recuse Itself. Cintron concludes that the court was harsh and opines that the Court was vindictive in denying a continuance. Finally, Cintron expresses an opinion that the Court seemed disinterested and cold at his sentencing. [DE-3].

13. The need to foster an appearance of impartiality in the Judiciary is not only important but also well enshrined in the statutes and ethical canons. Davis v. Jones, 506 F.3d 1325, 1331 (11th Cir. 2007). There is a recognized need for an unimpeachable Judicial system in which the public has unwavering confidence. Id. at 1332. The question of whether a

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[15] Obviously, the Court is aware of its own testimony, a portion of which is contained in Exhibit "B" However, since the rule of witness sequestration was invoked and the Court was not present during Its son's testimony, there is no indication that the Court heard or later even read the other trial testimony.

judge's impartiality might be reasonably questioned under 28 USC §455(a) is an objective standard designed to promote the public's confidence in the impartiality and integrity of the judicial process. Id. at 1332 n. 12. 28 USC § 455(a) has eliminated a judge's duty to sit as a consideration in recusal cases.

14. In the Government's Response, they oppose recusal arguing that Cintron can not sustain his burden of showing that a disinterested, lay observer, fully informed of the facts, would have in 2007 or would now entertain a significant doubt about the Judge's impartiality. The Government accurately points out the differences, factually, between Cintron's case and the case involving the court's son. This court agrees that "where a case, by contrast, involves remote, contingent, indirect or speculative interests, disqualification is not required. In re: Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988); Clemons v. U.S. District Court, 428 F.3d 1175, 1178 (9th Cir. 2005). Mere facial expressions of a judge in prior proceedings are not grounds for disqualification. U.S. v. Civella, 416 F. Supp. 676 (W.D. Mo. 1975). A reasonable person is not someone who is hypersensitive or unduly suspicious. U.S. v. Holland, 519 F.3d 909,912 (9th Cir. 2008). Certainly, in a close case, the balance tips in favor of recusal. Id. Indeed, this Court must resolve any doubts in favor of recusal. U.S. v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989). However, in the absence of a legitimate reason to recuse, a judge should continue to participate in assigned cases. Holland at 912. Here, any appearance of impropriety is too remote either in similarities or in time. See U.S. v. Mendoza, 468 F.3d 1256, 1265 (10th

Cir. 2006). If a Judge's family member becomes a crime victim, does that disqualify the judge from handling all criminal cases, the same type of criminal cases, similar criminal cases, cases with some similarity? If disqualification is appropriate because of some strikingly similar event, for how long?[16] Does the notification of a release from prison trigger a new obligation to recuse? Here, Cintron gambled with an open plea, rather than going to trial. The Court imposed a sentence lower than suggested by the government and below the guidelines. After having to withdraw his appeal, Cintron discovers that over eight years ago, the Judge's son was a victim of a lewd act committed by a male, and because Cintron is a male, who is supposedly similar in stature and appearance to the prior criminal and because both crimes involve children, Cintron contends that this court should have disqualified itself in 2007, or at least notified Cintron so that he could have filed such a motion. Cintron alleges, subjectively, that the Court appeared cold and

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[16] For about one year after the conclusion of this court's son's case, the court would disclose the case whenever Mr. Voluck represented a client before this Court. Upon disclosure, the court does not remember any defendant availing himself of the recusal option. After a period of time, the Court discontinued the practice of disclosing Mr. Voluck's participation in my son's case because of the belief that no reasonable person would question the court's impartiality due to the lapse of time. See, In Re Martinez-Catala, 129 F.3d 213, 220-21 (l" Cir. 1997). A temporal relationship is important. See Caperton v. A.J. Massey Coal Co., 2009 WL 1576573 12 (U.S.S. Ct. June 8, 2009).

disinterested at sentencing. The Court has no recollection of that, and the sentencing transcript would seem to refute those allegations.[17] Had Cintron been aware of his allegations in 2007 and made a motion to disqualify, It would have been denied. Nothing has changed in the nineteen (19) months since the sentencing to change what would have then been a reasonable ruling. If anything, the same grounds to disqualify, now argued eighteen months more removed from the events in question, should not mitigate in favor of disqualification. Cintron really is complaining about the court's rulings: denying continuances and imposing a stiffer sentence than he hoped for. Such adverse rulings, although relevant to an issue of implied bias under 455, rarely would be sufficient to Justify disqualification as a sole basis. Byrne v. Nezhat, 261 F.3d 1075, 1103 (11th Cir. 2001). A reasonable person viewing the facts presented here would not question this court's impartiality. A reasonable person would view this court's handling of these matters to have been even-handed. Bettis v. Toys "R" Us-Delaware, Inc., 273 Fed Appx. 814, 820 (11 th Cir. 2008). Moreover, a cursory glance at the Clerk's record would not seem to reveal a bias on behalf of the court.

A query of the clerk's computer revealed the following cases sentenced by the
undersigned since October, 2000, as captured by both statutes 18 USC § 2422 and 18 USC § 2252A:

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[17] Nevertheless, this Court must be careful to guard against embroiling Itself in a running controversy. Caperton, at *9.

Date	Name	Case No.	Sentence	Range	Comment
12/31/01	Levy	01-8073	78 mo	78-97	D.D. denied
2/8/02	Gentile	01-6203	46 mo	46-57	D.D. withdrawn

The following cases were sentenced by the undersigned as captured by only statute 18 USC § 2422:

11/30/01	Estevez	01-8097	30 mo	30-37	low end
6/30/03	Pena	03-20132	41 mo	41-51	low end
8/18/03	Montealegre	03-20133	1 yr & 1 day	12-18	low end
9/1/05	Callahan	05-60073	46 mo	46-57	low end

The following cases were sentenced by the undersigned as captured by only statute 18 USC § 2252:

1/18/01	Hertz	00-6259	180 days HC	21-27	D.D. granted
5/18/01	Calascibetta	00-6351	41 mo	46-57	D.D. granted
8/29/01	Hodge	01-8007	21 mo	21-27	low end
1/11/02	Simion	01-6108	6 mo	21-27	D.D. granted
3/13/03	Keller	02-60231	60 mo	60	mand. mm.
2/28/03	Zuelcer	02-60233	46 mo	46-57	D.D. denied
9/7/04	Deraway	04-60095	51 mo	51-63	low end
1/26/07	Boisvert	06-60283	78 mo	78-97	low end
3/14/08	Methvin	07-60237	151 mo	151-188	low end
6/5/08	Hope	08-6007	87 mo	87-108	D.D. denied
7/10/08	Ulmer	08-60039	51 mo	51-63	low end
11/17/08	Shebel	08-20524	96 mo	121-151	D.D. granted
4/7/09	Esposito	08-60199	78 mo	78-97	low end

15. According to the 2008 Sourcebook of Federal Sentencing Statutes: 6.2% of Pornography/Prostitution cases received a downward departure, 25.3% received a downward variance (page 77). 31% of sentences using Guideline 2G2.2 resulted in downward departures or variances (page 79). Moreover, it is noted

that the overall below range sentencing patterns changed post-Booker:

2004	4.9%
2005 (pre-Booker)	4.3%
2005 (post-Booker)	13.0%
2006	12.1%
2007	12.1%
2008	13.4% (page 63)

16. It would not seem that a reasonable person viewing these facts would harbor a fear that this court had developed some type of bias or animosity in these types of cases. All of the cases captured by the query resulted in sentences at the low end of the guideline range or a downward departure. (21 %). This is not the extraordinary situation described in Caperton. Id at *13.[18]

Wherefore, Cintron's Motion For Recusal is Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 10th day of June, 2009.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

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[18] Here, there is not a temptation to lead the average judge not to hold the balance nice, clear and true. Caperton, at *12. Due process does not require recusal nor do the statutes.